

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Raphael Mendez,

Plaintiff,

v.

ORDER

Civil No. 16-4002 ADM/BRT

Warden L. LaRiva, K. Lundy Staff Attorney, and
Unknown Inmate Legal Mail Room Servers in their
Official and Individual Capacities,

Defendants.

Raphael Mendez, pro se.

This matter is before the undersigned United States District Court Judge for a ruling on Plaintiff Raphael Mendez’s Motion for Abeyance [Docket No. 7] and Motion to Assign to Another Judge [Docket No. 12].¹ For the reasons set forth below, the Motion for Abeyance is denied as moot and the Motion to Assign to Another Judge is denied.

On November 28, 2016, pro se Plaintiff Raphael Mendez (“Mendez”) filed a 42 U.S.C. § 1983 Complaint [Docket No. 1], asserting claims against individuals at the Federal Medical Center in Rochester, Minnesota. Mendez did not pay the filing fee, but instead filed an application seeking leave to proceed *in forma pauperis*. See Application [Docket No. 2].

On January 26, 2017, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), Magistrate Judge Becky R. Thorson concluded that Mendez’s “current complaint is too confusing to survive screening at

¹ Also pending in this case is an Application to Proceed in District Court Without Prepaying Fees or Costs [Docket No. 13] (“IFP Application”). As discussed below, the IFP Application will be reviewed by Magistrate Judge Becky R. Thorson.

this time.” Order [Docket No. 3]. Judge Thorson permitted Mendez one opportunity to file an entirely new pleading by February 24, 2017. Id. On February 6, 2017, Mendez filed an Objection with Request to Reconsider [Docket No. 4], arguing that the original complaint pled a cognizable cause of action. On March 21, 2017, this Court overruled Mendez’s Objection, and Mendez was given until April 4, 2017 to file a new pleading or the Complaint would be dismissed. Order [Docket No. 6].

On April 3, 2017, Mendez filed a motion to hold the April 4, 2017 deadline in abeyance pending interlocutory appeal to the Eighth Circuit Court of Appeals. See Mot. Abeyance. That motion is now moot because on April 26, 2017, the Eighth Circuit denied Mendez permission to file an interlocutory appeal. USCA J. [Docket No. 8].

On May 5, 2017, Mendez filed an Amended Complaint [Docket No. 10], a Motion to Assign to Another Judge, and an Application to Proceed in District Court Without Prepaying Fees or Costs [Docket No. 13]. Turning first to the Motion to Assign to Another Judge, which is directed to the Clerk of Court, Mendez requests that this case be assigned to one or two new judges because the undersigned is allegedly acting in favor of Mendez’s adversaries. This Motion will be construed as a motion for recusal under 28 U.S.C. § 455, which provides that a judge shall disqualify herself in specific circumstances, including when her “impartiality might be reasonably questioned.” 28 U.S.C. § 455(a).

The motion for recusal is denied. Judges are presumed to be impartial and, accordingly, parties seeking recusal bear “the substantial burden of proving otherwise.” United States v. Dehghani, 550 F.3d 716, 721 (8th Cir. 2008). Mendez’s only evidence of impartiality is the adverse rulings he has received in his cases. “Adverse judicial rulings, however, ‘almost never’

constitute a valid basis for recusal; the proper recourse for a dissatisfied litigant is appeal.”

Dossett v. First State Bank, 399 F.3d 940, 953 (8th Cir. 2005).

Regarding the Amended Complaint, although Mendez missed the April 4, 2017 deadline to file a new pleading, he did timely file his abeyance motion. After the Eighth Circuit denied his request to file an interlocutory appeal, Mendez filed his Amended Complaint shortly thereafter. Therefore, the Amended Complaint will be deemed timely and is thus the operative pleading in this case, which is now ripe for review by Judge Thorson.

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiff Raphael Mendez’s Motion for Abeyance [Docket No. 7] is **DENIED** as moot and Mendez’s Motion to Assign to Another Judge [Docket No. 12] is **DENIED**.

BY THE COURT:

s/Ann D. Montgomery
ANN D. MONTGOMERY
U.S. DISTRICT JUDGE

Dated: June 6, 2017.